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# MATERIALS ON CONFLICT OF LAWS

Volume 1C

Professor John Swan

and

Professor Vaughan Black

1987 - 1988

Faculty of Law

University of Toronto

and

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CONFLICT OF LAWS

## Table of Contents

## Volume 1C


II. Escape Devices

1. Introduction ..... 195

2. The Substance/Procedure Distinction ..... 195

Toronto-Dominion Bank et al v. Martin Estate 199

Alberta Treasury Branches v. Granoff ..... 204

Notes and Questions ..... 207

Block Bros. Realty Ltd. v. Mollard and Detra Holdings Ltd. ..... 208

Questions and Notes ..... 214

J. D'Almeida Araujo v. Sir Frederick Becker & Co. Ltd. ..... 218

Questions and Notes ..... 225

3. Renvoi ..... 228

Re Annesley ..... 232

Notes and Questions ..... 240

4. Characterization ..... 242

Haumschild v. Continental Casualty Company . 244

Levy v. Daniels' U-Drive Auto Renting Co. .. 252

Notes and Questions ..... 254

## II. ESCAPE DEVICES

### 1. INTRODUCTION

We have seen that the whole structure of the traditional choice of law process depends on the initial characterization of the question or matter before the court. It would take little imagination to realize that the courts have manipulated the characterization of the question to justify the result that the court wanted, for reasons which it did not care to state, to reach. Such manipulation is no more unexpected than the kind of manipulation that courts make of consideration or cause in tort. In fact, the more black-letter a rule appears or the more rigid the "correct" application of the rule is thought to be, the more likely the court is to manipulate the rule, for the rule has no apparent elasticity or "leeway" to permit the court to weigh openly the competing merits of the parties' claims.

There are three principal methods that the court can use to reach the result that it feels should be reached. The first of this is the distinction between substance and procedure, the second is the doctrine of renvoi, and the third is the open choice of competing characterizations. In the section of this Chapter that follows we shall briefly explore the devices that are open to the court.

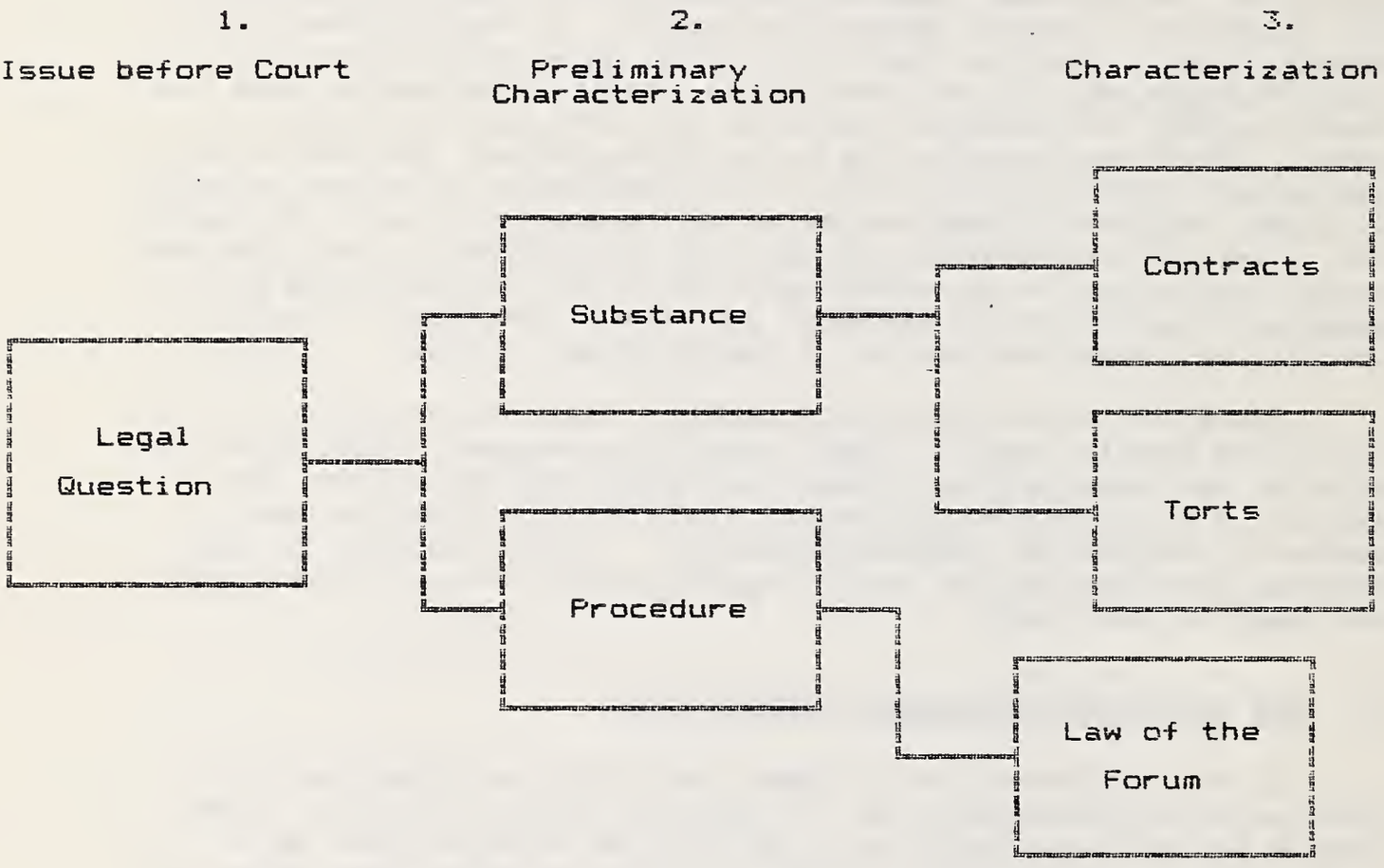
### 2. THE SUBSTANCE/PROCEDURE DISTINCTION

In the Introduction to these Materials we discussed the process of characterization. A dispute which initially looked like a torts case might, on occasion, be characterized as a contracts case or a family case in order to bring into effect a different choice of law rule and change the outcome of the dispute. Such 'recharacterizations' are not common. In general a dispute is so obviously a 'contracts case' or a 'torts case' that the prospects of re-categorizing it as something else are slim. There is, however, one aspect of the characterization process which frequently comes into play: the substance/procedure distinction.

No matter what law is selected by the choice of law process, no Canadian court will ever apply a foreign law which it views as procedural (as opposed to substantive). In addition, even when some foreign substantive law is found to apply, a Canadian court will not view that foreign law as displacing any forum law which is characterized as procedural. In other words, the procedural rules of the lex fori will apply, even if they have the effect of

contradicting or reversing the applicable foreign substantive law. Table 1, supra, p. 32, can now be revised to include this preliminary question:

Table 2




It is easy to see why this problem is a common one. Indeed, whether or not it is expressly adverted to, the substance/procedure distinction must be made in every case in which some foreign law is found to apply. For example, if, as in Etler v. Kertesz, an Ontario court decides to apply the contract law of Austria, that cannot have the effect of saying that the Ontario court must behave exactly as an Austrian court would if the Austrian court were trying the case. If the Ontario court had to imitate an Austrian court in every respect it would have to use Austrian rules for launching a claim, it would have to start its hearings at the same time of day as the Austrian court, it would have to use Austrian rules of evidence and pleading, it would have to conduct the proceedings in the German language, and so

on. Obviously this is not what the choice of law process requires.

The Ontario court will use its own procedure and simply import that substantive law chosen by the choice of law rule. Presumably the procedural differences between Austria and Ontario, such as whether the plaintiff sits on the right side or the left side of the courtroom, have no real impact on the outcome of the litigation. In addition, it would be difficult and time-consuming to import and apply such things as Austrian evidence law. We can assume that, like the matter of which side of the court you sit on, the differences between the Austrian and Ontario rules of evidence are, in the final analysis, inconsequential. Both Austrian and Ontario rules, though they may be as different as left and right, have the purpose of presenting to the trier of fact the data relevant to the decision to be made.

It should be noted that, to the extent we characterize legal rules as procedural, we risk negating the choice of law process. If we decide that the law of some foreign jurisdiction governs a dispute (we can call this the lex causae), and then turn around and categorize the issue governed by that law as procedural, we might just have well not have chosen to apply the court's domestic law in the first place. Similarly, if we are going to call all forum laws procedural, with the consequence that they override the lex causae, we will have rendered the choice of law process useless. Although it seems necessary to classify or to characterize certain rules as procedural it will be important to confine the limits of this classification to ensure it does not intrude into the merits of the dispute.

It is not clear that the traditional method of making the distinction has been particularly useful in limiting the range of what will be characterized as procedural. For example, in Huber v. Steiner (1835), 132 E.R. 80 (C.P.), Tindal C.J. characterized England's Statute of Limitations as procedural. Thus, although the action was on a promissory note made abroad, and both the plaintiff and defendant were domiciled in France, the longer English limitation period permitted the action to be brought in England which would have been time-barred in France. An example of this in Canada is Benedict v. Antuofermo (1975), 60 D.L.R. (3d) 469 (N.S.S.C., T.D.), where the Nova Scotia court entertained an action arising out of an Ontario traffic accident, even though the action would have been time-barred by the limitation period in Ontario's Highway Traffic Act. Conversely the same rule can also operate to bar an action where the forum's limitation period is the shorter one, even though the limitation period of the place where the accident occurred is still running: Allard v. Charbonneau, [1953] O.W.N. 381, [1953] 2 D.L.R. 442 (Ont. C.A.).

Escape Devices...

Sometimes these cases are justified by the reasoning that limitations statutes do not, by their express terms, destroy a cause of action, but only limit the time in which a court may entertain that cause of action. That is, limitations statutes often use words such as "no action may be brought . . .", and such words seem procedural. This same reasoning is often used to find that writing requirements, such as those found in the Statute of Frauds, are procedural. Such requirements are said to take away the remedy but not to destroy the right. Does it seem likely that the drafters of Statutes of Limitations or the Statute of Frauds had in mind these consequences for the choice of law process?

In the following two cases foreign substantive law is found to govern the contract in question. We see the defendant trying to escape liability by availing itself of some rule of forum law which might be characterized as procedural.

**Notes and Questions**

1. Esson J.A. dissented, based on reasoning similar to that used by Walker J. in Toronto-Dominion Bank v. Martin.

2. It seems likely that the 'seize or sue' restriction in the B.C. Chattel Mortgage Act has some effect on B.C. chattel mortgages at the time they are made. Because the legislation restricts their in rem remedies, B.C. mortgagees will protect themselves in other ways. They may charge more, or at least require a larger initial payment in order to compensate for the negative (to them) effect of this consumer protection legislation. Alberta mortgagees, such as the plaintiff, do not have to take this factor into account. Since the choice of law process has already told us that this is an Alberta mortgage, does it not appear that the substance/procedure distinction has frustrated the purpose of that process?

3. How difficult would it have been for the B.C. court to have 'abandoned' this procedural rule of the forum?

Escape Devices...

**Questions and Notes**

1. After reading this judgment list the factors that are relevant in supporting the conclusion that the plaintiff is entitled to its commission. In particular, what factors induced the court to consider that the act did not involve a matter of procedure?

(a) To what extent is the distinction between substance and procedure a matter of the form in which the act is drafted?

(b) To what extent is the distinction capable of being reduced to some kind of predictable process?

(c) The distinction between substance and procedure can become blurred. For example, what law **should** govern the limitation period, the burden of proof or the parol evidence rule? (We know that the limitation period is often treated as a matter of procedure because most such statutes are worded as "barring" the action and not as "destroying" the right. Is such an analysis or justification convincing?) What is the purpose of a limitation period? Similarly, what are the purposes of the other two rules?

2. In R. v. Sutcliffe Agencies Ltd. (1980), 17 R.P.R. 245 (Man. C.A.), a real estate agent, who was licensed in Ontario, and who had a listing of land in Ontario, was approached by a Manitoba resident who wanted to purchase the land. The agent took the agreement of purchase and sale to Winnipeg where the purchaser signed the agreement. The agent was prosecuted in Manitoba for acting as a real estate agent without a Manitoba licence. What the agent did was held to be a violation of the Real Estate Brokers Act, R.S.M. 1970, c. R. 20, and a conviction of the agent for "negotiating" a sale in Manitoba without being licensed to do so was upheld.

Which would you think was worse, what the defendant did in Sutcliffe Agencies Ltd., or what the plaintiff did in Block Bros. Realty?

3. Notice that the B.C. legislation contains s. 37(2). What would have happened in Ross v. McMullen had Alberta had the equivalent section at the time that the case was decided?

4. The large issue raised in Note 4 on pp. 91-93, just preceding the extract from Ross v. McMullen, (supra) can now be reconsidered with Block Bros v. Mollard as a specific case for the focus for our analysis:

**(a)** In the light of the court's analysis of the enforceability of the contract in British Columbia, what inferences can one draw about the purpose seen by the court for the act, and in particular, for the prohibition on claims by unlicensed agents?

**(b)** Suppose that you are appearing before a British Columbia court on behalf of an unlicensed agent who had acted for a vendor and was now suing for her commission. Suppose that there are no foreign facts. How could you use the judgment of the Court of Appeal in your argument? Could it be seriously argued that the claim is one that should attract all the consequences of illegality? In view of the final paragraph of the extract from the judgment of Craig, J.A., can the failure of the person suing for a commission be really seen as justifying the conclusion that "ex turpi causa non oritur actio"? What then does the judgment do to the whole concept of illegality in contracts?

**(c)** Can the judgment of the court be used to base an argument that in a case similar to Sutcliffe, no offence has been committed? What would have happened if the plaintiff in Block Bros. v. Mollard had already been convicted for the offense of acting as an agent without a licence?

**(d)** If the enforceability of contracts to pay a real estate agent a commission is determined by ordinary choice of law principles, what content do we now give to the limitation on the parties' freedom to choose whatever law and for whatever purpose that was articulated by Lord Wright in Vita Foods?

5. In the case of Block Bros. Realty Ltd. v. Mollard, the defendant also attempted to evade its liability under the Alberta contract by claiming that the relevant provisions in the B.C. Real Estate Act were procedural. The court rejected the defendant's argument, holding that legislation should be characterized as procedural only if the question is beyond any doubt. Seaton J.A. was on the bench in both Granoff and Block Bros. How could he concur in both decisions?

6. One matter which is normally thought to fall within the realm of procedure is that of who may (or should) be a party to a legal action. In Regas Ltd. v. Plotkins, [1961] S.C.R. 566, 26 D.L.R. (2d) 282 the issue concerned the right of an assignee of a chose in action to sue in his own name. At common law the assignee of a debt could not sue in its own name. This fact led to the intervention of equity and the eventual development of statutory rules permitting assignees to sue in their own names in certain circumstances (See, e.g., Conveyancing and Law of Property Act, R.S.O. 1980, c. 90, s. 53, Law and Equity Act, R.S.B.C. 1979, c. 224, s. 32, and Judicature Act, S.N.S. 1972, c.

2, s. 39 (5).) The right of an assignee was, however, subject to three important qualifications: (1) the assignment must be absolute, i.e., not given merely as security; (2) the assignment must have been of the whole debt; and (3) the assignee must have given notice to the debtor. These limitations are important for the protection of the debtor who is entitled to have all the parties who might have a claim against it bound by a single judgment, so that it is not subject to multiple actions. The debtor is also entitled to know to whom it is liable.

The debt sued on in Regas had arisen in Saskatchewan. The assignment that was relied on by the plaintiff had been made in Alberta. By Saskatchewan law (now Choses in Action Act, S.S. cap. C-11, s. 2) the assignee could sue in his own name. By Alberta law (The Judicature Act, R.S.A. 1955, c. 164, s. 34(15)) an assignee could not. Plotkins had sued in Saskatchewan and the defendant argued that, since the proper law of the assignment was Alberta, the question of whether Plotkins could sue in his own name was governed by Alberta law. The Supreme Court unanimously rejected this argument, holding that the right of an assignee to sue in his own name is a matter of procedure governed by the lex fori.

7. Is the question this simple? Suppose that the facts were reversed and the debt had arisen in Alberta. What arguments could you make on behalf of the defendant?

---

Another matter sometimes characterized as a question of procedure is the law of remedies. It is said that the forum should always apply its own remedial law. This issue was raised in Chaplin v. Boys, (supra, p. 132). Lord Wilberforce discusses this rule at the end of his judgment (supra, p. 140).

In Livesley v.E. Clemens Horst Co., [1924] S.C.R. 605 the Supreme Court limited the scope of the rule. In that case, the plaintiff was an unpaid seller under a sale of goods contract, the proper law of which was California. Californian law gave the unpaid seller a lien on the goods and the right to sell them and claim for the difference between the proceeds of sale and the contract price. An action was brought in British Columbia, where sellers had a more restricted right. In rejecting the appellant purchaser's argument that the remedial rules of the forum should apply, Duff J. wrote:

> In principle, it is difficult to discover a solid ground for refusing to classify the right to damages for breach of contract with other rights arising under the proper law of the contract, and recognizable and enforceable as such. . . . The exception embraces a very wide field, and among other things excludes procedure, because the policy of the English law recognizes no vested rights in procedure, and a party invoking the jurisdiction of the courts must take procedure as he finds it. The concept of procedure, too, is, in this connection, a comprehensive one, including process and evidence, methods of execution, rules of limitation affecting the remedy and the course of the court with regard to the kind of relief that can be granted to a suitor. But it does not, of course, extend to substantive rights; and here questions as to substantive rights include all questions as to the "nature and extent of the obligation" under the foreign contract. Fergusson v. Fyffe [[1840] 8 Cl. & F. 121, at 140, 8 E.R. 49, at 56] per Cottenham L.C.
>
> It is most important to observe that it is not the foreign agreement to which effect is given by English law but, as the language of the accurate judge, whose judgment is quoted, suggests, it is the civil or legal right generated by the contract. The right of action, as Willes J., said in Phillips v. Eyre [[1870] L.R. 6 Q.B. 1, at p. 28], is a "creature" of the law by which the contract is governed. Applying the principle to circumstances of the case before us, the lien given to the vendor, and the accessory right of sale, are obviously substantive rights given by the law of California to the vendor as such; in his capacity, that is to say, as seller under a contract of sale. And the right to recover the difference between the contract price and the moneys realized on the sale would seem to be not less so.

The result of the case is that sometimes remedial issues will be viewed as substantive and sometimes procedural, though the Supreme Court's use of the vested rights principle as the test for deciding the question may not help us in predicting what will happen in future cases, that particular test having been rejected some years after the decision of the Supreme Court of Canada.

Would you feel confident in saying that, when the remedial law of the lex causae is significantly different from that of the forum and is also easy to apply, then the remedial law of the lex causae will be found to be substantive?

**Questions and Notes**

1. What question does the conventional inquiry into the measure of damages try to answer?

2. What question does the conventional inquiry into "remoteness" of damage try to answer? Put into other words, what is the effect of the decision in Hadley v. Baxendale?

3. Are Pilcher, J. or the authors that he quotes correct in their analysis of the law of damages?

4. What difference should the answers to these questions make in the law to govern the issue before the court?

5. If the goal of the choice of law process is uniformity to what extent can that process be expected to achieve that goal if the English analysis is dependent on distinctions based on the idiosyncracies of the common law?

6. If you examine the traditional English textbook available in 1953, the discussion of the law of damages will be divided into two parts. The first part will be a general statement of the goal of compensation discussed in about a page or two. The balance of the discussion will be on Hadley v. Baxendale and on the issue of remoteness. It is worth spending a moment to note some things about that focus.

> **(a)** The issue in Hadley v. Baxendale is usually put as one of "foreseeability" as a factual matter. You will remember that the judgment of the House of Lords in Koufos v. C. Czarnikow Ltd. (The "Heron II"), [1969] 1 A.C. 350, [1967] 3 All E.R. 686, focusses on whether the fall in the price of sugar in Basra was or was "not unlikely" as a factual matter, and that this inquiry determined the result of the case.
>
> **(b)** If the issue of "remoteness" is cut loose from the debris of the cases and traditional commentary, the issue cannot be one of fact. It is perfectly clear from the judgment of Alderson, B. in the case itself, that whether the defendant was or was not informed of the likelihood of the loss is irrelevant to the damages to which the defendant is exposed. Alderson, B. says:
>
> > For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. (Emphasis added.)

Escape Devices...

> (c) In other words, communication is by itself irrelevant unless the defendant expressly accepts the risk of loss arising from the special circumstances communicated, and presumably, does so for an additional payment. Hadley v. Baxendale has nothing to do with the facts that might or might not be "foreseeable" and everything to do with the risk of loss accepted by the defendant. The problem is, so to speak, the converse of that which exists where there is an exemption clause in a contract. An exemption clause allocates a risk of loss to one party from the other party who would, absent the clause, bear the risk. The party who accepts the risk of loss arising from "special circumstances" assumes a risk, which were it not for the assumption of liability, would be on the other party.

---

The British Parliament passed legislation providing that restrictions on the time within which actions are to be brought shall be regarded as substantive for the purposes of conflict of laws: see the Foreign Limitation Periods Act, 1984. Canadian law has no equivalent legislation, though some provincial limitations acts contain "tolling" provisions. These provide that, if a person against whom a cause of action arose is outside the province, the person entitled to the cause of action may bring it within the limitation period, calculating that by deducting the time that the person was out of the province, so that the period begins to run after the return of the absent person. (For example, see Limitations Act, R.S.O. 1980, c. 240, s. 48 and the Limitation of Actions Act, R.S.N.S. 1967, c. 168, s. 4(1), as am. by S.N.S. 1970-71, c. 10, s. 3.) In other words, the limitation period does not begin to run until the absent person returns. It is generally conceded that such provisions only apply when the absent person is ordinarily resident in the province. Also pertinent is s. 38(1) of the Federal Court Act, S.C. 1970-71-72, c. 1:

> Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings in the Court in respect of any cause of action arising in such province . . . .

The effect of this is that, regardless of where the Federal Court is sitting it must apply the limitation period of the province where the cause of action arose. This provision avoids

the potential problems posed by the substance/procedure distinction, but it may present difficulties of its own.

Is the province in which the cause of action arose necessarily the jurisdiction whose substantive law will be selected by the relevant choice of law rule?

The issue dealt with by the Federal Court Act, above, arises more generally. We shall later have to deal with the relevance of provincial law in actions in the Federal Court. For the moment consider the case of Miida Electronics, Inc. v Mitsui O.S.K. Lines Ltd., ITO - International Terminal Operators Ltd. v. Miida Electronics, [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641. In this case the Supreme Court of Canada stated that there was a "federal law of contract" applicable to actions arising in the Federal Court under its admiralty jurisdiction. This federal law is neither the same as the provincial law as found in the common law provinces - third party beneficiary contracts are enforceable under the federal law, but not under provincial law - nor that law of contract found in Québec. The Miida Electronics case concerned the allocation of the risk of loss arising from the loss of electronic equipment stored in the Port of Montréal.

Escape Devices...

3. RENVOI

The kinds of questions with which we have been concerned so far have taken the validity of the choice of law process illustrated in the cases very much for granted. We have not considered whether it might be seriously or fundamentally flawed. Nothing as important as the process outlined in the preceding cases can be taken for granted. To begin a more radical assessment of the process we can usefully ask two questions that arise out of Bondholders v. Manville - the case of the action against the Saskatchewan woman brought by the holder in due course of a note given to a bankrupt Florida real estate agent.

(d) Was any purpose served by applying the foreign, Florida, law? That is, were any policies, conceived by Florida law or by Saskatchewan law as relevant to an action on a contract, advanced by the decision?

(e) Was there a good reason to depart from domestic legal policy regarding contracts, viz, that in the absence of strong reasons to the contrary, bargains are enforced?

The problems of married women's contracts are now no longer with us, everyone being equally free to put herself or himself into the lion's jaws and to hope, sometimes against all the evidence to the contrary that the lion will be a merciful lion. (See Llewellyn, The Common Law Tradition. (New York: Little, Brown and Company, 1960) pp. 362, 363.) For a discussion of married women's contracts in conflicts cases, see B. Currie, Selected Essays on the Conflicts of Laws (Durham, N.C.: Duke U.P., 1963) pp. 77-127.

Bondholders may be used to illustrate another fundamental conflicts issue. Once the process of characterization has determined the legal category into which the case falls, and the appropriate choice of law rule and connecting factor has been applied, we end up with a governing law. This process has underlain all the cases we have so far examined. A further question can now be raised: If we decide to apply foreign law, how much of the foreign law are we to apply? Does the reference to foreign law, for example, include a reference to its conflicts rules? Our choice of law rule in Bondholders results in the application of Florida law. Should we now investigate what law a Florida court would apply to a similar case of geographically complex facts before it? Suppose that Florida law (or the Florida courts) would refer the question of the capacity of a married woman to contracts to the law of her domicile. The Florida court assumed that Mrs. Manville was domiciled in Saskatchewan. (Remember that Dicey & Morris refers in Rule 147

(supra p. 75) to a person's domicile (as an alternative reference) for purpose of determining that person's capacity to contract.)

If we take notice of Florida's choice of law rule and accept that the issue of the defendant's capacity is now to be governed by Saskatchewan law, we could use the metaphor that the Saskatchewan court's original choice of Florida law including its choice of law rules has resulted in a "return" of the governing law to that of Saskatchewan. This process of making reference to the conflicts rules of the foreign law to which our original choice of law decision pointed us, is known as the "Doctrine of Renvoi". "Renvoi" literally means "return", and the tennis analogy would be appropriate to describe the process: the Saskatchewan court serves and the ball lands in the Florida court (I make no apologies for the pun). That court returns the ball to Saskatchewan. The question now is what happens next. Does the game continue in an endless rally or does one side simply stop the game? If one court stops the game, on what ground does it do so?

The game will be stopped by one court's deciding to apply either the Saskatchewan law of contracts or Florida law of contracts, exclusive of its conflicts rules. On the facts of Bondholders, if the Saskatchewan court "accepted" the renvoi from the Florida court, it would uphold the contract, if the Saskatchewan court returns the ball to the Florida court, (i.e., does not accept the renvoi), it would apply Florida law. (Some cases discuss the question whether the Florida court would accept the renvoi from Saskatchewan; if it would not, then the Saskatchewan court (sadly, and with a sense that a promising rally has been aborted) would apply Saskatchewan law.

We shall examine from time to time in the course both the intricacies of the doctrine of renvoi and those areas of the law where it is conventionally accepted that the doctrine will be applied. The importance of the doctrine lies in the fact that, like the issue of the substance/procedure distinction and characterization, it is an inescapable consequence of the choice of law process we have been examining.

It is generally said that renvoi will not be used in contracts cases. (Morris and Cheshire, "The Proper Law of a Contract" (1940), 56 L.Q.R. 320, criticise Lord Wright in Vita Foods where, after determining that the proper law was English, he says that "English rules relating to the conflict of laws must be applied ..." (supra, p. 83, the final sentence of the first paragraph on that page) as introducing the doctrine of renvoi into contracts cases.)

Escape Devices...

The argument that renvoi does not apply, or is not to be applied in cases characterized as contracts cases is admitted to be a practical exception to the general inevitability of renvoi. The concession that renvoi is inevitable, or is logically entailed by the structure of traditional conflicts rules is of fundamental importance to our ability to accept the traditional choice of law process as a satisfactory solution that we are supposed to deal with.

There are two illogical consequences of the doctrine. One is the argument of Morris and Cheshire (supra) and now expressed in Dicey and Morris, (10th ed.) p. 74, and Cheshire and North, p. 74 that the doctrine is of only limited application. Morris and Cheshire do not argue that renvoi is not logically entailed, only that its application in every case would be too complex. The question that remains is whether one can maintain such a position without, so to speak, throwing out the baby with the bath-water. Either the doctrine is everywhere justifiable or nowhere justifiable. One simply cannot pick and choose for no good (i.e., principled) reason.

The second problem is that at the same time as the doctrine of renvoi is logically entailed or necessary, it is equally logically insoluble. Either there is an endless oscillation or one side, so to speak, stops the rally, picks up the ball and goes home with it. Why the rally stops at any point is the great mystery. There are two theories: single or partial renvoi - once over the net and once back when the ball stops (this is the civilian method), or total renvoi - three times over the net when the ball stops. This is all known as the "English" doctrine and is, of course, more sporting than the civilian method. The problem of renvoi is made even more awkward by the fact that uniformity of results (indeed any result at all) can only be achieved if both courts do NOT adopt the same rule. If both courts adopt the same rule, then either no solution is possible (there is an endless rally) or different solutions will be reached. Thus Dicey and Morris state: (10th Ed. p. 79)

> Circulus inextricabilis. As we have seen, the effect of applying the doctrine of total renvoi is to make the decision turn on whether the foreign court rejects the renvoi doctrine or adopts a theory of single or partial renvoi. But if the foreign court also adopts the doctrine of total renvoi, then logically no solution is possible at all unless either the English or the foreign court abandons its theory, for otherwise a perpetual circulus inextricabilis would be constituted. So far, this difficulty has not yet arisen, because English courts have not yet had occasion to apply their renvoi doctrine to the law of a

> country which adopts the same doctrine. It is perhaps unlikely that any foreign country will adopt different conflict rules from, but the same renvoi doctrine as, those prevailing in England. Consequently, this difficulty (unlike the first two which have been mentioned) is more academic than practical. Yet the possibility remains, and the circulus inextricabilis cannot (it is submitted) be dismissed as "a (perhaps amusing) quibble." "With all respect to what Maugham J. said in Re Askew," [[1930] 2 Ch. 259] said the Private International Law Committee, [First Report (1954) Curd. 9068, para. 23(3)] "the English judges and the foreign judges would then continue to bow to each other like the officers at Fontenoy." It is hardly an argument for the doctrine of total renvoi that it is workable only if the other country rejects it.

We shall claim that traditional conflicts doctrine is fundamentally incapable of meeting its own goals by its acceptance of the doctrine of renvoi. To argue that it is too complicated to apply the doctrine in contracts cases is not an adequate answer to the question of the doctrine's scope, unless a reasoned justification can be found for arguing that contracts cases require simpler rules than, say, marriage cases where it is accepted that renvoi may be applied. Carried to its conclusion the argument for simplicity would suggest that contracts cases be decided by flipping a coin. If we reject this method as undercutting the demand for rational and reasoned decision making, how can we pick an arbitrary point at which to stop our investigation of the rules we have determined are relevant, that is, to stop the potentially endless oscillations of renvoi?

The following case is an example of renvoi being applied by a court.

Escape Devices...

**Notes and Questions**

1. Cheshire and North state: p. 75

> ... the renvoi doctrine cannot be rejected in toto, since it has proved to be a useful and justifiable expedient for the solution of at least certain special questions. The conclusion, in fact, is that in general a reference made by an English rule for the choice of law to a foreign legal system is to the internal law, not to the private international law, of the chosen system, but that this general principle is subject to ... exceptions.

2. The exceptions are:

> **(a)** Bequests (Gifts of movable property - i.e., personalty);
>
> **(b)** Title to foreign land;
>
> **(c)** Certain cases of title to movables; and
>
> **(d)** Marriage.

In the first and fourth examples renvoi is usually only applied to make the bequest or marriage valid. It is not used to make a bequest or a marriage invalid. What happened in Re Annesley?

3. What purpose of either French or English law was forwarded by the decision in Re Annesley? Is any justifiable reason given for the restriction of the testamentary freedom of the testatrix? In other words, if the common law has a principle, akin to that in the law of contracts, that a testamentary document will be given effect absent some good reason to the contrary, what reason is there for denying Mrs Annesley full testamentary freedom? What reasons justify the restriction of testamentary freedom in Ontario now?

4. How would you use the statement from Cheshire and North in any case you were arguing?

5. There is a curious case, Re Thom (1987), 40 D.L.R. (4th) 184, (Manitoba Court of Queen's Bench) in which a widow of a man who died intestate, owning property in both Saskatchewan and Manitoba, sought to claim the widow's preferential share in both provinces. She obtained her share, $40,000, in Saskatchewan where the couple had been domiciled at the date of the man's death. Saskatchewan law would be relevant to determine the share that she would take because the relevant choice of law rule is that succession to movable property is governed by the law of the

domicile of the deceased at the date of his death. The conflicts distinction equivalent to that between real and personal property in the common law is that between movable and immovable property.

She then claimed the widow's preferential share, $50,000, in Manitoba on the basis that Manitoba law applied since the Manitoba property was land, and the distribution of land is a matter for the law of the *situs*. The court rejected her claim, noting that if it were allowed, an equitable distribution of the estate would not be achieved for the children would be disadvantaged by the widow's double claim.

The court awarded the widow $10,000, the difference between the two shares. The court said that if it were to dismiss the Manitoba claim, it would be "sitting as a court in Saskatchewan, applying the law of that province. This is what is known as the doctrine of *renvoi*. While English courts have applied the doctrine, courts in Canada have not been favourably disposed to do the same ..." Counsel for the children had already argued that "conflict of laws principles are outmoded and should not be applied".

6. What do you think the position of the judge should have been on the facts of *Re Thom*? (We can ignore for now the argument of counsel for the children, though it would be interesting to know what he meant by the claim that conflicts was "outmoded".)

7. How would you plan the affairs of a testator or testatrix so as to avoid the problems created by the chance that a Canadian court might adopt the doctrine of renvoi?

Escape Devices...

## 4. CHARACTERIZATION

We know from everything that we have ever learnt in law school that "bright line" divisions between areas of law, between rules of law and between any kind of test and some other test do not exist. There may often be simple or paradigm cases, but since these are, literally, too clear for argument they are neither litigated not studied. No one would waste money litigating them, and no one would be in any doubt as to what advice should be given to a client.

The cases that are both litigated and studied are those where there is difficulty drawing the line: Is there or is there not consideration for this promise? If there is no consideration does it matter? Is this a form of liability that attracts contract type damages or tort type damages? Is this case within that class of cases where relief can be given for mistake, or for some other disappointment.

The traditional rules assume that the process of characterization is both possible and likely to be carried out with the same result in both or all concerned jurisdictions. The process is, of course, possible in the sense that everyone could be made to fit Procrustes' bed, but it is quite inconsistent with the general approach of the common law. If you are asked whether something is a "contracts" question or a "torts" question, you are likely to ask, "Why do you want to know?" Definitions of concepts are not usual in the common law, and are only made in a very small number of situations where very often great awkwardness is the result. The current dispute over the proper limitation period is one such example. When it matters whether the plaintiff's cause of action is characterized as a torts case or as a contracts case, the courts will very often leave the law in a state of confusion, for the choice of slot will be made in result selective way. If the court wants to lengthen the period within which the plaintiff can bring its action, the claim will be called a tort claim. It is not over-stating the current confusion to say that the courts can call almost any claim a torts claim or a contracts claim as it suits them.

Two recent examples of such developments are:

1. Frank Elger & Co. Insurance Agency Ltd. v. Gestas Inc. (1987), 38 D.L.R. (4th) 274, (Ontario H.C.) In this case the insurer had issued a policy on a "claims made" basis, i.e., covering any claims made during the policy period. A claim was made during the policy period, but the claim arose out of an action started against the insured before the policy coverage

extended to the particular claim made. The court held that the claim came within the policy.

2. Re Thames Steel Construction Ltd and Northern Assurance Co. Ltd. (1987), 38 D.L.R. (4th) 312, (Ontario H.C.) In this case the insurer had issued a policy covering claims arising out of an "occurrence ... during the policy period". A loss arose from the collapse of a roof fourteen years after it had been built by insured. The court held that the insured had an obligation to defend the claims made by the owners of the building against the insured. In other words, the claim was held to have arisen out of an occurrence during the policy period.

In order for the court to have reached either of these results, the claims must have been regarded as something other than contracts claims. The effective evisceration of the old limitation period for breach of contract that has been achieved by the general collapse of the distinction between contract and tort. The best example of this fact is Consumers Glass Co. Ltd. v. Foundation Co. of Canada Ltd./Compagnie Foundation du canada Ltée. (1985), 51 O.R. (2d) 385, 20 D.L.R. (4th) 126, (C.A.). See also V.K. Mason Ltd. v. Bank of Nova Scotia, [1985] 1 S.C.R. 271, 16 D.L.R. (4th) 598, 58 N.R. 195, 35 R.P.R. 118.

The following case illustrates a court's use of characterization to avoid a rule that it did not like.

**Notes and Questions**

1. You can see in Levy and Haumschild the courts' manoeuvering in the context of the American rules for choice of law in torts in 1928 and 1959. It is irrelevant for the purposes for which this case is used here that the choice of law rules applied are not the same as ours. You should note also that the rules for both contracts and torts are not the same as those that would now be applied by the American courts.

2. The Ontario Court of Appeal in Charron v. Montreal Trust (supra, p. 105) could easily have prevented the widow's action by characterizing her claim as one of succession or matrimonial property rather than contract. If either of these characterizations had been made the choice of law rule would have indicated that the law of the husband's domicile at either the date of his death or the marriage would have applied.

3. What criteria could you, as counsel for the estate or for the defendant, have offered to the court to induce it to do so? What arguments might counsel for the widow have made? How would you use cases like Haumschild and Levy?

4. What would you infer from the arguments that you might make about the factors that would be likely to move the court one way or the other?

5. The contagion that is carried by these compromises and refusals to talk openly about what is at issue has been carried to every part of the traditional conflicts doctrine. If we can defend result-selectivity in characterization, we can defend it in determinations of the proper law of the contract. It is, therefore, regarded as permissible to choose the proper law with an eye on the result that the choice will lead to. Since the reason for the choice must be hidden - the test for the proper law of the contract refers only to the law of that jurisdiction that has the closest and most real connection with the contract - once again no reasoned argument is possible, nor are counsel given any guidance on what facts might be relevant.

6. The following statement openly endorses result-selective characterization and the use of devices like renvoi to reach desired results. Castel, Conflict of Laws, Cases, Notes and Materials, 5th Ed. 1984, pp. 1-15:

> ... Canadian courts should not feel ashamed to use the traditional method of jurisdiction-selecting rules to solve conflict of laws cases. The centuries old process has resisted many assaults and on the whole, proved quite successful. To say that the courts choose a law without considering how that choice will affect the controversy is

> not accurate. The lawyer representing one side or the other in a case characterizes ... the problem in such a way that it will, by virtue of the relevant conflict of laws rules, ultimately call for the application of a law supporting his client's contention. Obviously, he has examined the contents of the potentially applicable laws. If the court feels that it would lead to an unjust result to apply the law called for by the suggested characterization, it will reject such characterization, or use other techniques such as renvoi, public policy, and so on in order to apply a different law and reach a different result. As will be noted, characterization is not a purely mechanical process. If more than one characterization is available for a set of facts, the choice between the characterizations may turn upon the court's desire to achieve justice in the particular case or preference for one rule of law over another.
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> Under the traditional approach the court is able to concern itself with the contents of the foreign laws among which it has to choose and of the policies behind them before selecting the one state whose law will be applied, even though the court does not frame its opinion in those terms. In practice, the courts do not proceed independently of the law's contents which are to be discovered at a later stage of the inquiry. Since in most jurisdictions the foreign law must be alleged in the pleadings, this gives the court an indication of the laws which will be relied upon by the parties.

It is important that you understand why we have called this section "Escape Devices". The principal claim that is made for the traditional theory is that it provides for uniform results regardless of where a case may be litigated. This claim is expressly made by Castel, Canadian Conflict of Laws, Vol. 1, p. 10, where he says:

> The rules of conflict of laws must be such that they will prevent the decision from depending on the fortuitous place of trial. Forum shopping must be discouraged.
>
> Predictability and uniformity of results are especially important in areas where the parties are able to give advance thought to the legal consequences of their acts.

and implicitly made by Dicey and Morris and Cheshire and North in their respective discussions of the functions of Conflicts analysis.

The claim that traditional theory contributes to or ensures uniformity of results can only be maintained if the opportunities for manipulation of the rules to reach the desired results are hidden behind the screen of theory. The devices we have examined are one method by which the openly conflicting goals advocated by Castel can be simultaneously supported.

Does the following statement advance the argument that the traditional rules are effective or not? Morris, The Conflict of Laws 2nd Ed. p. 9 says:

> In any given case the choice of law depends ultimately on consideration of reason, convenience and utility - e.g., how will the proposed choice of law work in practice, not only in this case, but also in similar cases in which a similar choice may reasonably be made?

How would you use this statement to argue for any desired result in any of the cases you have so far looked at?

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